Appendix I

White et al v. The Bank of Toronto et al.

WHITE ET AL V. THE BANK OF TORONTO ET AL.

The following is an excerpt from an unpublished manuscript about the family and descendants of George and Susan White, by Andrew Thomson:

Gerald White had been born in 1899 and educated at London Collegiate Institute (later London Central Secondary School) and Royal Military College, Kingston, Ontario. After graduating in 1918 from RMC's special accelerated program to produce urgently needed officers for Canada's war effort, he took a commission in the artillery and served in Europe until 1919. Following demobilization, he attended McGill University and the Massachusetts Institute of Technology, where he received a degree in engineering administration in 1923. He worked for the family firm in London for a couple of years but apparently disagreed with his father's approach to the crisis faced by the firm in the mid-twenties. Gerald resigned in 1926 during the reorganization to work in Montreal for Lord and Burnham Co., a noted boiler and greenhouse manufacturer based in Irvington, New York. A year later, he moved to Bogota, Colombia, to organize a logging and lumber business.

Gerald went to Barranquilla, a city on the north coast of Colombia near Cartagena, where he founded a sawmill, the Compañia Andina de Maderas. It prospered greatly until the crash of 1929, when the price of lumber fell to one-tenth its previous value. Gerald returned to Canada and joined Canadian Industries Limited. After three years (1934 to 1937) with the firm, he returned to South America, with his wife Aileen Ethel Stairs of Montreal and Knowlton, Quebec, as the representative of the Sharples Co. of Philadelphia, distributors of Sperry gyroscopes. He had a sales office in Buenos Aires and another in São Paulo, where his son, Peter Gerald White, was born on 28 December 1938. Once again, Gerald was out of the country as the Bank of Toronto and his father settled the firm's affairs. His absence probably explains his delayed acceptance of the agreement. At the outbreak of World War Two Gerald left Sharples, and in 1940 he went to England to join the Royal Canadian Engineers; the government of the Netherlands, in its gratitude for Canada's role in liberating Holland from the Nazis in 1944 and 1945, decorated him. He left the army in 1945 with the rank of lieutenant-colonel and went to work in Montreal for Drew Brown Ltd., an international export-import firm founded in California in 1928 and later based in Toronto. While there, he launched a legal claim to regain control of George White and Sons. Although he knew it was a long shot, Gerald felt that even a slight chance of success justified the attempt, and he was fully prepared to risk the costs of the litigation.

Arthur White had died in 1941. In his will, he transferred to Gerald, his only son, "all shares of the capital stock and all other equity owned or held by me in the capital stock and/or assets of

George White and Sons Co. Limited, incorporated 1925, or any successor thereto." For Arthur, the family's stake in the firm was still an open question. In February 1948, Gerald launched a civil action to regain the class A shares turned over to the bank by his father and his uncles. On the face of it, this attempt seemed unlikely to succeed. The report of the case states that the brothers had transferred their shares to the bank along with a letter making it absolute and final. Moreover, in 1938, Gerald White himself had written to the bank acknowledging that he had "no interest in any Class A shares of George White and Sons," an opinion shared by other members of the family as well. In July 1948 Gerald wrote his aunt Nell, the wife of the deceased Fred White addressing this very concern:

You are quite right in saying that all the shares in George White & Co. were given outright to the bank in accordance with documents signed at that time to square their indebtedness. However it appears that the bank, in accepting these shares to square this indebtedness, were contravening the Bank Act and therefore, the whole transaction was illegal.

Gerald's case advanced claims against the Bank of Toronto and Ernest Popkin. Mr Justice Sir Allen Bristol Aylesworth summarized the core argument against the bank in the decision rendered by the Ontario Court of Appeal in 1953. White had argued that the transactions of 1932 and 1938 should be declared ultra vires and, thus, null and void. His opinion was based on an interpretation of the Bank Act which held that while banks could accept shares in companies as collateral for loans, they could not use those shares to operate the company or "carry on business." Therefore, either the shares were collateral, in which case they should be returned; or the bank, by keeping the shares, was operating the business and thus exceeding the law. The case against Popkin was more complex and related to the events of 1938. Gerald claimed that when the Bank had required the family to turn over its remaining shares, Arthur White and Popkin had reached a secret agreement:

Shortly before the receipt by the bank in March 1938 of the 1,000 class "A" shares from members of the White family, Arthur William White had secured from the respondent Popkin, unknown to the bank, a written agreement stipulating that if at any time within ten years from the date of the agreement the bank should turn over to Popkin 60 percent of the capital stock of the company, or any greater part thereof, Popkin in turn would assign to Arthur William White 40 percent of all such stock. Arthur William White had requested Popkin not to tell the bank about this agreement and in fact the bank never learned of it until some years later, when Popkin finally disclosed its existence. Arthur William White in turn had undertaken with his brothers to divide with them any shares he received under his agreement with Popkin.

In the end, the bank had turned over at least 60 percent of the stock to Popkin. On the strength of this agreement, Gerald White claimed 40 percent of these shares, or 24 percent of the total. Gerald's action was launched early in 1948, just before the expiry of the 10-year period mentioned in the agreement. Mr Justice E.R.E. Chevrier reserved judgement three years later. The first judgement was rendered in 1952.

The Toronto Telegram's brief report on the case summarized the question. "If a bank holds all or a majority of the shares in a company and controls the company through a shareholding concern, taking the profits, can it be said the bank is carrying on a business?" Goldwyn Arthur Martin (1913-2001), an eminent Toronto criminal lawyer, acted for White, argued that it had and "this is a contravention of the Bank Act, which prohibits a bank from dealing in business or trade." Moreover, although the company's debt to the bank had been repaid by 1945, the bank continued to retain all shares, controlled the company, and retained its voting power. "All the shares were assigned to the bank to retain only until the indebtedness could be paid off and then the bank should divest them," Martin argued. "If the bank has no intention of divesting the shares then the bank is dealing illegally." L.W. Pickup, acting for the bank, disagreed. The shares had been given to the bank as "an absolute transfer and not contrary to the Bank Act. The bank has acquired shares of the company and not the physical assets."

The case was, in fact, more complex. Justice Chevrier summarized the questions as:

A. Were the shares assigned to the bank.
(a) as collateral only, or
(b) not as collateral, but absolutely?
B. If the shares were assigned to the bank not as collateral, but absolutely, then had the bank the right to retain them after the bank has been completely and fully paid off?
C. And had the bank the right to dispose of the shares in the manner in which it did?
D. Did the bank carry on the plaintiffs' business from the time it received the shares until its indebtedness was paid?
E. If it did, was it such carrying on of business as is permissible under the provisions of the Bank Act?
Chevrier found against the plaintiff on all questions. On the first question, the transfer of stock in 1932 was accompanied by a declaration that the shares were transferred "not as collateral or a security in any way, but as an absolute and final transfer of the shares to be used in such a way as the General Manager of the Bank may from time to time in his absolute discretion see fit without accounting to the undersigned [the Whites] in any way in connection therewith." Chevrier commented bluntly: "Effect must be given to the plain, clear, unambiguous English words in which they express themselves." He found the transfers absolute and the bank within its rights to accept the transfer on these terms.

On the second question, Chevrier admitted that "there is much virtue in that submission, but one must look at the terms of the instrument by which the shares are assigned." He found no disposition in the Bank Act to prevent the bank from accepting the shares on the terms described. The third question dealt with whether the bank had retained the shares after the debt was paid, and whether the distribution was legal. Chevrier observed that it was clear to Arthur White and his brothers in 1932 that, if the company survived, some shares would go to Popkin as a reward for his role in the recovery. The Whites had accepted this arrangement and Chevrier found that the distribution met the terms of the initial agreement.

To answer the question as to whether the bank did "carry on business" in a manner prohibited by the Bank Act, Chevrier looked to the structure of management after the transaction. The bank had appointed P.J. Hanely, a branch manager, as its representative on the board of George White and Sons; L.V. Wright had been appointed to make a financial survey of the firm in 1936 and continued to supervise the company's finances until 1945 when the debt was repaid. While Popkin remained president and general manager, he, in fact, reported to Wright who "had a good deal of authority in running the affairs of the company and conferred with the bank on matters of importance concerning the company." Although there were but a few cases touching upon this matter, Chevrier reviewed the two main ones: The Ontario Bank v. McAllister et al., and Northern Crown Bank v. Great West Lumber Co. Even here, the definitions were unclear and Chevrier quoted Mr Justice Davies in the former as having great difficulty in making up his mind. Chevrier and his predecessors were left to reconcile two seemingly contradictory sections of the Bank Act. While Section 1(d) allowed the bank to engage in and carry on such business generally as pertains to the business of banking, Section 2 (a) prevented it from dealing in the buying or selling or bartering of goods or to be engaged in any trade or business. Did the bank have a right to accept the transfer of an asset to save loss from a debt past due? Was the bank "carrying on business"? Or, was it attempting to avoid loss in a manner consistent with section 1 (d)? Chevrier decided that, at times, the exigencies of banking required a bank to "carry on the business of the obligee for such a length of time as to enable it to realize on its securities, escape loss and save the obligee from bankruptcy."

It seems to me that what Parliament meant by subs. 2(a) was that the bank is not to engage in the traffic of goods, in a business completely separate and independent of its primary business of banking, but that it may carry on the business of the obligee either to enable the assets to be disposed of as a going concern, or to enable it to realize on its security. I think the distinction is made clear when saying, "the bank may carry on the business of," and saying "the bank is carrying on business". In the circumstances of this case as revealed by the evidence I conclude that the bank, in dealing with the assets of the company in the manner in which it did, did act within the powers conferred upon it by the Bank Act, and that its actions are unimpeachable.

On the fifth question, of how the bank disposed of the shares, Chevrier found that the distribution met the standard set by the instrument conveying them to the bank and did not contravene the provisions of the Bank Act. He further noted his understanding that "on the presentation of the argument in this matter, that the claim against Popkin had been abandoned." Apparently, there was no extant copy of the agreement with Popkin. In the final paragraph of his ruling, Chevrier rejected Gerald White's claims and assigned him costs.

Despite this substantial victory in the lower court, the Bank of Toronto then made a settlement offer to Gerald White in order to avoid the costs and uncertainties of an appeal to the Ontario Court of Appeal. Chevrier's expressed hesitations in his judgement may explain the bank's motivation. The situation was complicated, however, by Gerald's residency in Spain at the time and negotiations were conducted by cable and mail. On 2 January 1953, Martin alerted him by cable of the bank's offer of $15,000 subject to the signing of releases by all of the litigants. "Unless you advise otherwise," White replied the following day, "will not accept less than

twenty-four percent stock envisaged agreement White Popkin plus dividends my expenses your fees". Martin and his colleague, Charles Leonard Dubin (1921-2008) a future chief justice of Ontario, were more cautious. Given the results at trial, they believed that an appeal to the Judicial Committee of the Privy Council (JCPC) of the British House of Lords might be necessary to achieve victory. Although such appeals were no longer possible after 1949, White had initiated his case prior to the change and an appeal could be made. Because The Ontario Bank v. McAllister et al. (1910), 43 S.C.R. and several other relevant cases had been decided by the Supreme Court of Canada, an appeal to the JCPC would be essential if they were to be overcome. It would, Martin warned, be expensive, perhaps as much as $10,000, with no guarantee of success.

The ensuing discussions of the settlement and an appeal revealed that the rest of the family had no interest in sharing the cost of any litigation. Ernest White, still working for the company, took no part whatsoever nor did Fred White's estate. This was, in Martin's view, an "unsatisfactory position" with regards to the minority shareholders. Combined with Gerald's move to Spain, it made agreement on a settlement, or anything else, complex. Gerald assured Martin that his sisters, Eula and Shirley, would follow his lead but the other family members could not be counted on. In these circumstances, Martin and Dubin recommended settling for $20,000 and costs. For his part, Gerald wanted $48,000 for himself and $500 each for Shirley and Eula. The lawyers held scant hope of success at the Ontario Court of Appeals stage and only limited hope at the JCPC. Martin was forthright and expressed his concern cryptically in a cable on 11 January 1953.

Apparently any settlement other than proposed offer impossible stop Concerned of danger of losing all in addition to heavy expenditure to you in further proceeding stop After extensive consultation with Mr. Dubin feel we should advise settlement on offer if best available stop Will endeavour to get more.

White tersely responded the next day: "My terms or appeal".

Frustrated by his lawyers' willingness to settle for less, White wrote to Kenneth Mackenzie of the Toronto firm Mackenzie, Saunderson, Wood and Goodchild. In his letter to "Uncle Ken" (Mackenzie was related to Gerald's wife Aileen Stairs), he sought advice. Although Martin had been recommended to him by Mackenzie and the Right Honourable Arthur Meighen, White was disappointed that Martin was reluctant to proceed. (As a young bachelor in Montreal, Gerald had shared a summer house on Lac St-Louis in Dorval, Quebec, with Meighen's son Theodore "Ted" Meighen and other young blades — they called it the Dog House.) For his part, Gerald considered the bank's offer "quite unsatisfactory" and urged Mackenzie to meet with Martin concerning his "eagerness to bale [sic] out". He also asked Mackenzie seek out a director of the bank to determine "if some amicable arrangement might be reached.". Gerald also updated his uncle Ernest "so you will have some basis for making a decision in case you are asked for a release." Gerald warned his uncle that he and Howard White (Fred's heir) might be approached by the bank to sign releases if there was agreement on the offer of settlement; any money forthcoming from the bank would be additional, he noted, to what Gerald received.

In the event, no settlement was reached, and the case went to appeal. Martin and Dubin spent the whole day before the Ontario Court of Appeals on 14 January 1953. The three judges reserved their decision. Martin believed that they had received a fair hearing, “but two of the judges, however, seemed to express views which were unfavourable to our submissions.” As the parties waited for a judgement, there was renewed discussion of a settlement as well as renewed consideration of an appeal to the JCPC and its cost. Gerald maintained his aggressive stance while his lawyers were more conciliatory. In March, Mackenzie reviewed the case after speaking with Martin. He now advised “not as a matter of law, but as a matter of business, as to what would be a proper settlement for you to accept.” He agreed with White’s lawyers that if the appeal went badly, the next logical step was the JCPC. He cautioned, however, that “this would be an expensive proceeding even if you won and disastrous if you should lose. My off-hand view is that you have a better than even chance of winning, but the risk is great.”

As it turned out, the appeal went badly. Mr Justice Aylesworth delivered the court’s decision without any hint of Chevrier’s doubts. He dismissed the notion that the bank had acted beyond the provision of the Bank Act. It had “carried out in full its part of the deal with the assignors of the shares.” Moreover, the bank had taken notice of the Whites’ concerns in 1933 and 1938 to protect the employees and their family name from the consequences of bankruptcy. The family, he pointed out, had not objected to its actions in these matters. Although the bank controlled the majority of the shares, it did not control all of them; the company retained a separate corporate identity and the business was its [George White and Sons] and not the bank’s. “The company was,” he declared, “no mere ‘sham or simulacrum’...it was no alter ego of the bank.” In his conclusion, he cited a decision rendered by the Alberta Court of Appeal in 1914:

I think it is impossible, without destroying the essential nature of the joint stock company as a separate legal entity created by our statute law, to say that a bank which legally acquires control of a majority of shares in a joint stock company organized to engage in trade or business and, by observing the formal procedure necessary to exercise control is thereby indirectly carrying on that trade or business... But where control is exercised merely by acquiring shares in the company and by taking advantage of the legal machinery created by the companies’ ordinance then to deny that it is the company, and the company only that is carrying on business is in my opinion tantamount to destroying the whole effect and intended result of the legislation with respect to joint stock companies.

Once again, Arthur White’s agreement with Popkin was barely mentioned in the judgement. The decisive ruling left Gerald with limited options. Martin was apprehensive that the bank would now see little need to settle. The possibility of further appeal might provide new motivation in this regard; it would, however, be expensive. Martin and White exchanged cables and letters throughout May and June. White sought assurances that the JCPC offered a reasonable prospect of success, since “it seems to me that to undertake the expense of a Privy Council trial in the hope of getting a settlement not much better than the one previously offered is not a good gamble.” A week later, he wondered about raising the question of Popkin. This aspect of the case is least clear in the record. If, as Aylesworth’s decision indicates, it was

acknowledged that Popkin and Arthur White had entered into the agreement that Gerald alleged they had, then the court's reasons for ignoring it are unclear. Proving the bank's collusion in avoiding the obligations of the Popkin agreement was impossible. On the face of it, however, Popkin seemed a different matter. Martin, it should be noted, made no reference to him in his correspondence with Gerald. Even when answering specific questions, Martin ignored Popkin. It is likely that he viewed it as irrelevant or hopeless.

At the end of May, Gerald decided that the threat of renewed appeal was necessary. The expenses would be considerable not to mention the additional costs if it failed. As a result, he asked Meighen and Mackenzie if they "would be interested in taking a gamble with me by sharing the risk and the profit or loss of appealing the White v. Bank of Toronto case to the Privy Council?" After outlining the case and the necessity of appeal, the "only way I can manage this," he wrote, "is to form a sindicate [sic] to assume part of the loss in case of an unfavourable judgement." Gerald proposed forming 12 "units" of $1,000 apiece which would share 50 percent of the proceeds in the event of a favourable judgement. If the case was won, he valued each unit between $5,000 and $25,000. He asked them to "consider this as a strictly business proposition and subscribe only if you think it is a good gamble."

White informed Martin of his proposal indicating that he would not risk an appeal unless at least two units were subscribed. The latter replied immediately that the plan was improper. Although Martin followed his telegram with a letter, an astonished Gerald still required further clarification, "since it seems inconceivable to me that it is improper or illegal for me to form a syndicate or for my friends to participate." Mackenzie's response was unequivocal. "It may sound strange to you," he wrote, "but the fact is the proposal you make, which is known as 'maintenance', is not only illegal and unenforceable in civil courts but it is also, I'm afraid forbidden by the Criminal code." He not only promised to destroy Gerald's letter but also to ask Meighen to do the same. For his part, Gerald could only confess his ignorance, "to use the slang expression, my face is very red, about the letter I wrote to you concerning the formation of a syndicate for the George White and Sons appeal." Accordingly, he apologized noting his decision to appeal the case to the Supreme Court of Canada, a less costly if less promising avenue. The purpose of this course was to draw the bank into a settlement. By summer's end, even Gerald had recognized the futility of his hopes to regain the company by this course. On 17 August, Martin informed his client that the case was unwinnable and would only add to his costs. Gerald reluctantly agreed wondering what might be done about any costs sought by the bank. Once again, he reverted to the possibility of a case against Popkin as a prod to a settlement; for his part, Martin once again refrained from comment.

The bank had taxed its costs at $3,392.95 and was "willing to accept half of the taxed costs in return for a release from you against the bank. I do not think," Martin advised, "that we are giving up anything by signing the release as all our rights are terminated for failure to prosecute the appeal." In the resulting negotiation, Gerald and the Whites waived further action while the bank waived its costs. It took some time to obtain all necessary signatures on the waiver; indeed, in March 1956, the bank asked Martin to expedite the process; by December, Martin reported to White that the file could be closed. It was not, however, the end of Gerald's

relationship with George White and Sons; he still retained a small holding of shares. In late 1966, Donald N. McLeod, the company's president, offered him $10 each for every outstanding share. Gerald accepted and merely inquired as to the procedure for sale.

The case against the bank faced several obstacles. The straightforward concession of shares by the brothers, the lack of a record of the agreement between Arthur and Popkin, and the clarity of the bank's requirements of the family hobbled the effort. Furthermore, it was undermined by the lack of broad support from other members of the family. For them, the company was a thing of the past. Although Gerald's motive was not monetary – he did not need the money – he was not in Canada to assume day-to-day control in the event he won. In the end, he mounted a quixotic campaign either to restore the firm to the family's control, or to extract a settlement from the bank.

Note by Peter G. White:

G. Arthur Martin, retained by Gerald White at the suggestion of Arthur Meighen, was the leading criminal lawyer in Ontario at the time. His junior in this case was Charles Dubin, who later became Chief Justice of Ontario. Acting for the Bank of Toronto was John W. Pickup; his junior was David Menzel. Pickup was appointed Chief Justice of Ontario after the initial trial in 1951, but before the appeal to the Ontario Court of Appeal in 1953. He was replaced as counsel for the bank by C.C. Calvin, with Menzel remaining as Calvin's junior.

David Menzel, who went on to an eminent legal career in Ontario, remembers researching the issues in the case on behalf of the bank. He vividly recalls that, for several years between March 1938 when the bank acquired the remaining Class A shares then outstanding, and 1945 when it turned 60 percent of the shares over to Ernest Popkin, the bank had owned 100 percent of the Class A shares.

Arthur Martin had based White's case on the prohibition in the Bank Act against a bank "carrying on a business", and the courts dismissed this argument. But Menzel believes that Martin, who was not an expert in the civil law, never saw the real argument that would almost certainly have won the case for White. That was the provision of the Bank Act that stated that the maximum amount that a bank is entitled to recover from a loan is the entire principal amount owed, plus interest, which at that time was legally capped at 6 percent per annum. In the event, not only did the Bank of Toronto recover its full principal plus all its interest, but it also retained the 40 percent of the shares that it did not give to Popkin. According to the Bank Act of the day, this meant that the Bank of Toronto could have been forced give up at least the 40 percent of the shares that it still owned.

Menzel remembers that when he pointed out this possible argument to his lead counsel, Pickup turned white. He also recalls that after losing the case, Martin swore that he would never take

another civil case again. But even if Martin had hit upon this argument between the trial and the appeal, it would have done no good, as he had not brought any evidence on this point at trial.

The case report is at: White v. Bank of Toronto, 3 D. L. R. 118 (Ont. C. A.) (1953).